United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7075

B

To be argued by
GILBERT H. WEIL, ESQ.

United States Court of Appeals

For the Second Circuit

P/S

Docket No. 76-7075

THE NCK ORGANIZATION LTD., and
WILLIAM E. GREENE, JR.,

Plaintiffs-Appellees,

against

WALTER W. BREGMAN,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

WEIL, GUTTMAN & DAVIS
(formerly Weil, Lee & Bergin)
60 East 42nd Street
New York, New York 10017
(212) 687-8573
Attorneys for Defendant-Appellant

GILBERT H. WEIL,
of Counsel

BRUCE R. HAFNER,
with him on the Brief

TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

To be argued by:
Gilbert H. Weil, Esq.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -

THE NCK ORGANIZATION LTD., and
WILLIAM E. GREENE, JR.,

Plaintiffs-Appellees,

-against-

Docket No.
76-7075

WALTER W. BREGMAN,

Defendant-Appellant.

- -

BRIEF FOR DEFENDANT-APPELLANT

Preliminary Statement.

The decision appealed from was rendered by The Honorable Constance Baker Motley, U.S.D.J.

Issues Presented for Review.

The cardinal issue is whether the district court did not err, as a matter of law on the record before it, and abuse its discretion, when it disqualified Gilbert H. Weil and his firm, Weil, Lee & Bergin - now Weil, Guttman & Davis - (collectively, the "Weil firm") from representing the defendant, Bregman, herein. The district court disqualified the Weil firm because of some communications it had had with a Donald W. Randall, Esq. that dealt with certain issues between the plaintiff The NCK Organization Ltd. ("Org") and Bregman (which, having been settled, are not involved in the within litigation) and some of which discussed the present case. Randall never had represented Bregman in the within action, although he had served on occasion as Bregman's personal

legal advisor after having left his post as house counsel with Org. The Weil firm had never been lawyers for either plaintiff.

Component issues subsumed thereunder are:

1. Whether the district court did not err and abuse its discretion, in disqualifying the Weil firm from representing Bregman by departing from the firmly established rule that the doctrine of "appearance of impropriety" does not extend to an attorney who has not been previously related in any manner to an adverse litigant, and that such an unrelated attorney cannot be disqualified without proof of actual impropriety on his part, a fact that has not been alleged herein against the Weil firm, or even against Randall.

2. Whether the district court did not err and abuse its discretion in finding, contrary to the record herein, that Randall was in such a manner associated with the Weil firm in the within action as to require it to be disqualified; especially 1) in light of a total absence of either allegation or proof that Randall passed on to the Weil firm any confidential information regarding Org, and 2) Bregman, as Randall's superior and an officer and director at Org, was entitled and privy to as much, if not more, access to information relevant to the issues herein as Randall himself.

3. Whether the district court did not err and abuse its discretion in finding that this case raises a triable issue of fact, in connection with which Randall may have received confidential disclosures by Org, thus requiring the Weil firm's disqualification; namely, the "states of mind of both plaintiffs

and defendant during particular transactions" which led up to the execution of the option contract involved in this case (8a), which document, along with other pertinent contracts, the district court declared "seem clear on their face" (4a).

4. Whether the district court did not err and abuse its discretion in disqualifying the Weil firm when the record is devoid of any showing that its continued representation of Bregman cannot in any way taint the case; but its disqualification will separate Bregman from the counsel of his choice, result in substantial expense to him in obtaining new counsel after the more than two years that the within action has been in progress, and be of questionable, if any, benefit to the plaintiffs.

Statement of the Case

The within action was commenced on January 17, 1974 with the filing of Walter W. Bregman v. William E. Greene, Jr. 74 Civ. 301 (CBM). Org was not named as a party; the 74 Civ. 301 complaint set forth a simple cause of action against Greene alone, alleging his breach of an option contract to sell shares of Org stock to Bregman, and it sought damages from Greene for his refusal to do so.

On or shortly after January 24, 1974, Org effected service against Bregman of a summons and complaint in the Supreme Court of New York, New York County, seeking judgment declaring that Bregman was not entitled to exercise his option against Greene or, if he were, that Org was not obligated to repurchase the optioned shares from Bregman at any price other

than that which he would have paid Greene for them.

With the institution of that suit Bregman and Org became adverse litigants for the first time.

Bregman removed the New York County suit and, by stipulation and order entered May 16, 1974, the two actions were consolidated into a new one entitled The NCK Organization Ltd. and William E. Greene, Jr., plaintiffs, against Walter W. Bregman, defendant, and a new complaint was filed therein on May 22, 1974 by the thus named plaintiffs, where it was docketed in 74 Civ. 776 (CBM).

Subsequently, on motion of the plaintiffs, the Weil firm, which had been representing Bregman in all the foregoing litigation, and Randall, who had not, were ordered disqualified from representing him in the pending case (10a). Cross-motions for summary judgment were at the same time denied (ibid). The present appeal is from the first order only, although, as will appear below, there is some collateral connection between the disqualification and summary judgment motions.

> As the court noted in the portion of this opinion dealing with the summary judgment motions, there remain to be considered in this case substantial questions of fact as to the state of mind of both plaintiffs and defendant .... Given this posture of the case, Randall's representation of defendant

flies in the face of Canons 4 and 9,
and he must be disqualified ...
(8a). (Discussed at pp. 37-39 below.)

Statement of Facts

In November 1966 Bregman joined the English affiliate corporation of Org as its joint managing director, subsequently becoming its president (Bregman deposition [WWB Dep.] p. 4; complaint ¶¶3, 4). In connection with his purchase of shares of Org stock he signed certain standard forms of stockholders' agreements, the pertinent aspect of which is that they restricted, under certain circumstances, his ability to resell the stock to Org itself and, until after a three-year holding period, at essentially the price he had paid for them (Plaintiffs' Exhibits [Px] 1 and 2, clause 3) rather than at their book or other value [complaint ¶¶7, 8, and Exhibit A thereto].

In August, 1970 Bregman came to New York to join NCK pursuant to a special contract that was negotiated through Org's executive vice president and treasurer, and NCK's president, B. David Kaplan (WWB Dep. pp. 5-6, 12, and Px3). Bregman subsequently became president of NCK (WWB Dep. pp. 12-13). In the course of those negotiations Bregman himself wrote out the terms and conditions for his New York employment (WWB Dep. p. 38); Kaplan, not a lawyer, agreed to them in principle

and substance and brought Bregman's draft back to NCK/Org's house counsel, Randall, to be put into proper form [Randall deposition (DWR Dep.) pp. 7, 240-241, and Defendant's Exhibit (Dx) 9].

The salient provision of Bregman's 1970 employment contract (complaint ¶9, and Exhibit B thereto) was its clause 8 which relieved Bregman of the three-year holding period established by the standard stockholders' agreements, and committed Org to repurchase at book value any of its stock he might own if he was discharged.

> If your employment is terminated by NCK, [later Org (complaint ¶3)], all shares of the capital stock of NCK then owned by you will be repurchased in accordance with the second part of ¶3 (beginning "If the Stockholder (i) should at any time die ...") of the Stockholders' Agreement dated October 25, 1967 between you and NCK, without regard to the length of time you have held such shares. Your Stockholders' Agreement is hereby amended accordingly.

This echoed the requirement Bregman had written into his draft for the employment contract during the course of his negotiations with Kaplan, wherein he stated: "I feel therefore that I should have a certain amount of protection in the unlikely event that <u>you</u> wish to sever my relations with the company or remove me from the position of CEO [Chief Executive Officer]. This should include: a. payment in full on all my

shares owned at the time without regard to the three-year vesting period described in the current stockholders' agreement." (Dx9C-D).

Bregman was terminated as of January 2, 1974 [Px5].

On August 31, 1972 the plaintiffs had entered into the written contract containing the stock option that is the subject of the within action.

> Greene does hereby give an option to the persons named in Exhibit A annexed hereto [including Bregman], to be exercised within five (5) years of the date hereof, to purchase from Greene the number of shares set forth opposite the name of each on such Exhibit. The purchase price shall be as follows: ... (Px9, p. 1.)

On October 9, 1973 Weil was first contacted by Bregman. In a telephone discussion Bregman said he had been given notice of discharge; that there were a number of matters that might have to end up in the courts; that his lawyer at the time was not a trial attorney; and he asked whether Weil would be willing to step into the picture and represent him. Weil said that he would be glad to do so, and Bregman answered he would have his lawyer, a Mr. Randall, forward the papers that had to do with the situation, including a letter that he had sent a day or so earlier to Org setting forth a list of items to which he claimed he was entitled [now Px5]. (153a-154a.)

On or about October 15, 1973 Weil received the above materials, consisting of seven documents (now Px1, 2, 3, 4, 5,

8 and 21) and a memorandum dated July 23, 1973 from NCK's treasurer to Mr. Bregman. Each of these documents related to Mr. Bregman and had plainly come to his attention as president, senior vice president, director, chief operating officer, or shareholder in one or the other of NCK/Org. Also in the package was a covering handwritten memorandum by Randall explaining each of the other papers (154a-155a).

Weil's evaluation of Bregman's rights regarding his claims in Px5 was that they were governed within the four corners of the documents to which he was already privy, an assessment that appeared to be confirmed by Org's own counsel in a letter of October 25, 1973 to Mr. Bregman, responding to Px5: "... Almost every paragraph contains statements which are not in accordance with the facts as I understand them after a thorough examination of your past documents with the Agency." (Emphasis added.) (155a.)

On October 16, 1973 Weil telephoned Randall, and reported his interpretation of the documents and conclusions regarding them. Randall agreed that Bregman's rights stood or fell on the face of the papers, and, in response to a question by Weil, indicated no concern over the fact that he had earlier represented NCK/Org (he had been discharged before Bregman's termination, WWB Dep. p. 30) since Bregman knew everything that Randall did, and probably more, about the factual background surrounding his position vis-a-vis NCK and Org; that everything turned on the written contracts anyway, and, insofar as figures and accounting might be concerned, upon books and records of the corporation that would, of course, be subject to

subpena or discovery if the necessity should arise (155a-156a).

In any event, the present case does not involve any of the matters covered by Px5. They included nothing concerning the Greene option, or its exercise, and they have all been informally resolved by Org and Bregman. Not until October 24, 1973 did Bregman even raise the Greene option situation with Weil; and even then, he (not Randall) simply gave Weil a copy of the Greene contract, not discussing it in any detail, as he had not yet decided whether he wanted to exercise his option (157a-158a).

On November 2, 1973, after Bregman had received a letter from NCK/Org's counsel, Mr. Bisco, rejecting his demands, it was decided that Weil should take over and enter into negotiations with Mr. Bisco on Bregman's behalf (158a). At the same time Bregman decided to exercise the Greene stock option, based upon Weil's advice that, having studied the matter, he was convinced Bregman was entitled, under his June 17, 1970 employment contract, to redeem Greene shares immediately at book value. Weil then, or immediately following, drafted a letter for Bregman to send to Greene invoking his option rights, which letter was sent under date of November 5, 1973 (159a).

There was no further contact between the Weil firm and Randall until December 6, 1973 when Weil telephoned Randall to report an upcoming conference the next day with Mr. Bisco, and checked Randall's memory that Bregman was correct in reporting that despite an entry Randall had made in the minutes of a December 15, 1972 Org Board meeting [now Px41B], Bregman had not signed any documents waiving his right under the

June 17, 1970 employment contract to redeem Greene option shares without a three-year waiting period (159a-160a).

During the month's intermission between his contacts with Randall, it was Weil who was actively engaged on Bregman's behalf, without even advising, much less consulting, Randall; and without copying him with letters involved in the progress of Weil's activities. These included such matters as conferences with Bregman, and Weil's letter of November 28, 1973 to Greene restating and confirming Bregman's exercise of his option (160a-161a).

Between December 6, 1973 and January 24, 1974 there was no communication between the Weil firm and Randall despite the occurrence of events directly pertinent and important to the subject matter of the within action (all other matters of controversy having by then been essentially disposed of). For example:

1) Bregman and Weil met with Messrs. Bisco and Winkler (December 14, 1973) to discuss the Greene option/stock redemption dispute.

2) On December 27, 1973, after Weil received authorization from Bregman to institute whatever legal action Weil deemed advisable with respect to the Greene stock option, the Weil firm came to the conclusion that action should be brought by Bregman against Greene alone, and not against Org. Advised of that decision by telephone, Bregman acquiesced in it. The Weil firm neither

informed nor consulted with Randall concerning this.

3) The Weil firm, still not communicating with Randall, proceeded to draft a complaint against Greene, performed the necessary legal research, and decided to bring the complaint in the within federal court.

4) Under date of January 8, 1974, Mr. Bisco mailed to the Weil firm a copy of a summons and complaint against Bregman in the New York State Supreme Court, New York County, asking that service on behalf of Bregman be admitted, a request which the Weil firm responded it had no authorization to grant (163a-164a).

5) On January 17, 1974 the Weil firm filed Bregman's action against Greene (74 Civ. 301 CBM) (164a).

6) The next contact (since December 6, 1973) of the Weil firm with Randall was on January 24, 1974 when, after first having received Bregman's authorization to accept service of Org's summons and complaint in the New York Supreme Court, Weil simply gave a rundown to Randall of what had been happening in the meanwhile and reported he had decided to remove Org's Supreme Court action to the federal court, where he

expected that, one way or the other, it would end up being consolidated with Bregman's action against Greene so that everything could be resolved in a single lawsuit (164a-165a).

There were no further contacts between the Weil firm and Randall until June 6, 1974 when, with the knowledge and acquiescence of NCK/Org's attorneys, the Weil office called Randall to obtain certain clarification from him regarding a conformed copy of the standard Stockholders' Agreement (167a).

Thereafter, until plaintiffs herein had noticed the taking of Randall's deposition, the Weil office had no contacts with Randall. It then, however, met with him to discuss his forthcoming deposition, and all further communications with him dealt solely with that subject, or with the plaintiffs' motion to disqualify him and the Weil firm (168a). Significantly, on September 25, 1974 Peter Messer, Esq., an associate in the offices of plaintiffs' attorneys, telephoned Mr. Hafner, an associate of the Weil firm, and, in the course of advising him of the plaintiffs' intention to depose Randall, asked Hafner to arrange a date for his appearance. Hafner responded that Mr. Messer had better contact Randall himself, as the Weil firm had no control over him. This was before any intimation had been given of an intent on the part of the plaintiffs to move to disqualify Randall and the Weil firm (169a-170a).

Argument

Preface

Defendant is fully aware of the principle crystallized by the within Court in Hull v. Celanese Corp., 513 F.2d 568, at 571 (1975):

> The district court bears the responsibility for the supervision of the members of its bar. . . . The dispatch of this duty is discretionary in nature and the finding of the district court will be upset only upon a showing that an abuse of discretion has taken place. (Citations omitted.)

As with all exercises of lower court discretion, however, that doctrine is subject to the qualification that when the court acts contrary to law, or to the clear record evidence, there is an abuse of discretion which must be reversed on appeal.

> It is generally held that the trial court abuses its discretion when it fails or refuses properly to apply the law to conceded or undisputed facts. [Citations omitted.] Misapplication of the law to the facts is in itself an abuse of discretion. Hanover Star Milling Co. v. Allen & Wheeler Co., 7 Cir. 208 F. 513, 523. Such

abuse of discretion requires reversal.

Bowles v. Simon, 7 Cir. 145 F.2d 334.

Clemons v. Board of Education of Hillsboro, 228 F.2d 853, 857 (6th Cir. 1941).

Abuse of discretion in law means that the court's action was in error as a matter of law. And when such abuse exists, reversal will be ordered.

Beck v. Wings Field, Inc., 122 F.2d 114, 117 (3rd Cir. 1941).

No longer ago than December 22, 1975 the within Court, because of its disagreement with a district court's determination of facts and conceptions of the law, reversed its order disqualifying a firm of lawyers. International Electronics Corporation, et ano. v. Flanzer et al., Docket Nos. 75-7159, 75-7216, Slip Op. 1145 (2d Cir. December 22, 1975).

In what follows it will be shown that the decision below is based upon factual predicates wholly unwarranted by the record, and upon misapplications of substantive law.

I

Established law precludes disqualification of the Weil firm, lawyers who have never stood in professional relationship with either of the adverse parties, absent a showing, that has not been made, of actual impropriety.

Canon 4 ("A lawyer should preserve the confidences and secrets of a client") deals with actual disclosure of a client's confidential revelations to his lawyer. There is no evidence, nor even allegation, that Randall in fact made, or the Weil firm in fact received any communication in violation of Canon 4. It plays no role in this case.

It is Canon 9 that concerns itself with constructive liability in conflict of interest situations, because of its caveat that lawyers "should avoid even the appearance of professional impropriety", regardless of its veritable existence. Thus, the related lawyer, the one who has been in a position to acquire confidences from a client, and hence could, wittingly or not, pass them on to others, must not put himself in a suspect position, one that can reasonably cause a former client to fear such disclosure, even though that does not actually come to pass.

But the unrelated attorney, the one who was never a confidential recipient, cannot have an appearance of treating questionably with confidences he never received or of conflict with a client he never served; i.e., of impropriety. Even an attorney who has stood in professional relationship with a former client, later turned adversary, is beyond appearance of

impropriety if the subject matters of the earlier representation and the subsequent controversy are sufficiently distinct from each other that it does not reasonably appear that privileged disclosures pertinent to the former would lend themselves to exploitation in connection with the latter, infra.

The proposition that, without proof of actual impropriety, the appearance of impropriety doctrine of Canon 9 should be extended to unrelated lawyers has steadfastly been rejected by the courts. The long and short of it is that to be disqualified for conflict of interest an attorney must represent a party adverse to his former client against that former client, in the same transaction, or one closely related to it, as was involved in the former representation. T. C. Theatre Corp. v. Warner Bros. Pictures, Inc., et al., 113 F. Supp. 265 (S.D.N.Y. 1953).

> [W]here any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited. 113 F. Supp. at 268 (footnote omitted; emphasis supplied).

As will later be shown, neither prong of this bifurcated test is satisfied in the instant case.

The T. C. Theatre court disqualified an attorney (Cooke) retained by plaintiffs' attorneys of record. Cooke had previously represented defendant in an action brought by the government which raised the same issues as were involved in the later private treble damage action. A second motion was made

to disqualify Kahan, trial counsel in the private action. He had also represented Cooke in an action for fees due on the prior government suit (idem at 271). The court refused to disqualify Kahan; it would not infer, without proof, any disclosure to Kahan of confidential information that might have been learned by Cooke in the earlier action:

> The Court is not required to indulge in any presumption that Cooke has divulged confidences reposed in him by his former client simply because he is now engaged in a law suit with them. The presumption would be to the contrary. There is even less basis for the claim against Messrs. Garfinkle & Adler. Movant again presses upon the Court a "presumption" that they must have retained Cooke in order to make use of confidential information he received in the course of his former employment. It's not clear why it should presume the attorneys have acted unethically. On the contrary, I would presume that Messrs. Garfinkle & Adler had no such motivation. Idem at 272.

T. C. Theatre holds, then, that even an attorney who has been co-counsel with a disqualifiable attorney will not, without more, be vicariously reached by appearance impropriety.

Such a limitation upon the scope of disqualification is also supported by Cord v. Smith, 338 F.2d 576 (9th Cir., 1964),

and American Can Co. v. Citrus Seed Co., 436 F.2d 1125 (5th Cir., 1971). In Cord, the court disqualified an attorney (Young) from further representing Smith (plaintiff-appellee) because Young had formerly represented Cord (defendant-appellant) in the same matters as those being litigated. However, the court did not disqualify Murray, who had "already been associated as attorney some time ago in this proceeding here". Idem at 520. Rather, the court expressly allowed him to continue representing Smith.

This rule, that the disability does not reach beyond the attorney who has actually engaged in both representations, or, at most (but not always, as will shortly be shown), his partners, was followed in American Can Co., supra.

> To substantiate a motion for disqualification, the movant must first show an attorney-client relationship exists or existed. Once this is shown, liability to disqualification extends to partners and employees, of that lawyer who participated in the attorney-client relationship. Idem at 1129 (emphasis supplied).

American Can had retained two firms as co-counsel. Both were employed by, paid by and responsible to it. Ericson, a partner in one firm, had represented defendants in unrelated tax matters and appeared in the instant action "of counsel". The court disqualified him, his partner (Allison) and their firm from representing plaintiff; the Allison disqualification was based on knowledge imputed to him from Ericson. The court, however, would not take the next step and apply an "imputation-on-

an-imputation" to the firm which was "co-counsel" (idem at 1129) or to Miller, one of its partners.

> Carriage of this imputation-on-an-imputation to its logical terminus could lead to extreme results in no way required to maintain public confidence in the bar .... Ultimately all counsel for the parties in the present suit could be disqualified .... Such a rule would be unsound logically and indefensible practically. Idem at 1129.

Redd v. Shell Oil Co., 1974-2 Trade Cas. ¶75,392 at p. 98,272 (D. Utah, 1974), rev'd in part, 518 F.2d 311 (10th Cir., 1975) expresses the attitude of courts when faced with motions of this type, which must, of necessity cast professional aspersions upon the accused attorneys.

In Redd the court refused to disqualify an attorney, and the firm with which he was associated, from representing plaintiff. The attorney, Burbidge, had previously been associated with one of Shell's attorneys, the firm having represented Shell in other similar actions. The firm's activities notwithstanding, the court found that Burbidge's representation of Shell was limited to four instances, in none of which were the issues raised similar to those posed by the case before it. In refusing to disqualify, even though Burbidge had actually earlier represented Shell, the court held that the prior representation was not substantially related to the action, there at bar, the keystone of this rule of law (see conclusion of

law ¶6 at p. 98,276, idem). The court also found an inadequate factual foundation for purposes of the motion:

> The rule of T. C. Theatre Corp. only sanctions disqualification of an attorney for prior representation of an adverse party when the disqualification is based upon an adequate evidentiary foundation. It does not permit disqualification based upon speculation or suspicion that confidential information may have been obtained during the course of a young lawyer's association with a large firm. Attorneys are not presumed to behave unethically. Idem p. 98,278.

The district court's refusal to disqualify has been upheld on appeal. Redd v. Shell Oil Co., 518 F.2d 311 (10th Cir., 1975).

In a case similar to Redd, and involving the same law firm, Gas-A-Tron of Arizona v. Union Oil Co. of California, ___ F.2d ____, 1976-1 Trade Cas. ¶60,689 (9th Cir., 1976) the court refused to disqualify all lawyers in a firm, one of whose associates (Burbidge) had previously, while with a different law firm, worked on matters for certain companies that were adverse parties in the pending suit. The court wrote:

> The district court did not exceed its discretion in ordering Mr. Burbidge's disqualification. Although nothing in the record casts any shadow on Mr. Burbidge's

professional integrity or his good faith in resisting disqualification, the district court was within the bounds of its discretion in ordering his disqualification to prevent an appearance of impropriety....

However, the district court went afield in extending its appearance rationale to disqualify Berman [a partner]. The litigation upon which Mr. Burbidge worked during his association with McCutchen was either entirely remote from this antitrust litigation or only peripherally related to the subject matter. Unlike Chugach Electric Ass'n v. United States District Court, 370 F.2d 441 (9th Cir., 1966), the record provides no basis for an inference that Mr. Burbidge gained any actual knowledge of the private affairs of Shell or Exxon that could have been used by him in these antitrust cases. A fortiori, there is no room for an inference that Berman might have acquired any confidential information from Mr. Burbidge. Unless we are willing to say that the law will imply an appearance of impropriety whenever a firm hires a lawyer whose association with his prior firm gave him physical access to confidential information that might be relevant to the new firm's action against the former employer's client, we cannot uphold the order disqualifying Berman. We are

not willing to do so because we think that would be carrying appearances too far. ___ F.2d at ____, 1975-1 Trade Cas., at p. 67,994.

No case the plaintiffs have been able to cite, or defendant to find, has ordered disqualification except against the related lawyer or one shown to have been tainted by actual impropriety of Canon 4 nature.

Thus, the district court's opinion relies upon Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2nd Cir., 1973) and Hull v. Celanese Corp., 513 F.2d 568, 571 (2nd Cir., 1975). Emle, however, involved a related attorney, and Hull unrelated ones who had actually received disclosure of privileged information from the related lawyer. Hull noted:

> Based upon the relationship between Delulio [the related attorney] and the Rabinowitz firm [the unrelated lawyers], the preparation by the Rabinowitz firm on the motion to intervene, supporting affidavits, and amended complaint, and the contents of those documents, Judge Owen [the district court judge] concluded:
>
> > "The foregoing contents of affidavits prepared by Delulio and the Rabinowitz office are some evidence, in my opinion, of the possibility that Delulio, unquestionably possessed of information within the attorney-client privilege, did in fact transmit some of it to the Rabinowitz firm, consciously or unconsciously." 513 F.2d at 570.

Not only was Hull an unusual and extreme case, so much so as to be of a totally different genre from the one now before this Court, but, upon analysis, it confirms the principle that an unrelated lawyer to whom privileged information has not been exposed by an associated related attorney shall not be disqualified merely by virtue of that association, or by attenuating an imputation of impropriety.

The Hull court, for example, took pains to warn the bar:

> The novel factual situation presented here dictates a narrow reading of this opinion. This decision should not be read to imply that either Hull or Delulio cannot pursue her claim of employment discrimination based on sex. The scope of this opinion must, of necessity, be confined to the facts presented and not read as a broad-brush approach to disqualification. 513 F.2d at 572.

Hull, clearly, considered it had set an outer limit marker on the reaches of disqualification: one to apply under only extreme conditions.

They existed there. They do not exist here. The case at bar does not fall within Hull's boundaries. Rather, with Hull as a measuring rod of what is required in order to disqualify an unrelated attorney vicariously, the insufficiency of the showing here to do so stands exposed and confirmed. (Infra p. 28.)

Hull was an action "alleging sex-based discrimination in employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq." 513 F.2d at 569. Delulio moved to intervene as a plaintiff, engaging Hull's attorneys to represent her in filing charges against the defendants with the EEOC and on her intervention motion. Idem.

But Delulio had, before that, been employed by the defendant as an attorney working on its defense in the Hull case itself. As the court pointed out in marginal note 9,

> Delulio characterized her work on the Hull case as follows:
>
> > "During the six months that I worked on that case I studied the general regulations of the Equal Employment Opportunities Commission, its procedures and the law on sex discrimination generally. I obtained specific information from the personnel department at the division concerning salaries and hiring practices. I attended on [sic] interview of the employee's [Hull's] superior, and attended one interview of another division employee. I participated in a conference with outside consultants hired by the corporation to prepare statistical information regarding employment within the

> division. I obtained inter-office memoranda and prepared a memorandum myself regarding the case." (Bracketed matter in original.)
>
> 513 F.2d at 570.

As pointed out above, the court took into account, as well, the conclusion of the district court:

> The foregoing contents of affidavits prepared by Delulio and the Rabinowitz office [plaintiff's and Delulio's attorneys] are some evidence, in my opinion, of the possibility that Delulio, unquestionably possessed of information within the attorney-client privilege, did in fact transmit some of it to the Rabinowitz firm, consciously or unconsciously. Idem.

Thus, in Hull, there was:

> actual evidence of
> actual possession by the adverse party's former attorney (Delulio) of information imparted in reliance upon the attorney-client privilege, and
> actual evidence of actual disclosure of thusly privileged material to the new attorney to the detriment of the former client
> in the course of prosecuting litigation against it, involving the same (identical)

matter in which the former attorney had represented that party as its lawyer.

Hull leaves untouched the principle that the appearance doctrine of Canon 9 is not to be extended per se, through a related attorney to an associated unrelated lawyer, for Hull did not disqualify the new attorneys by invoking any such presumption or imputation. The Hull court ruled on the basis of actual evidence and actual fact; and because there was imminent danger even more actual disclosure would follow, "consciously or unconsciously", unless the prophylaxis of disqualification was imposed.

But, even more to the point than that, Hull is not merely distinguishable from the case at bar on the ground of its actual evidence of acquisition and improper disclosure of confidential, attorney-client material. It affirmatively holds that absent actual transmittal of such information by the former attorney to the new one, the latter will not be disqualified on the basis of the former's possession thereof.

This is inescapably implicit in the court's carefully expressed qualification, "This decision should not be read to imply that ... Delulio cannot pursue her claim of employment discrimination based on sex." 513 F.2d at 572. Obviously, if her knowledge, gained from her intimately professional relationship with Celanese, were to be imputable to her attorneys even without evidence of actual impartment, she could never "pursue her claim"; for every attorney she might turn to would become automatically disqualifiable by such an imputation.

In short, there is, on the one hand, in Hull, a case in which actual evidence established that the unrelated attorney had been in fact brought into possession of information originally obtained from the adverse litigant under protection of the attorney-client privilege, and that it had been passed on to the new attorney by the related attorney in violation of that privilege; and that such material was in the hands of the new attorney, subject to use - and actually used - in litigation against that former client.

On the other hand, in the case at bar, in strong contrast to that "novel factual situation", the plaintiffs' own attorney admits in paragraph 3 of his affidavit, "The turning point of this case really depends upon an agreement dated June 17, 1970 which was prepared by the witness Randall and a copy of which is annexed to the complaint herein as Exhibit B" (56a, 21a-24a).

There has been nothing confidential or privileged about that agreement. Bregman (not a lawyer, as was Delulio) is a party to it; has known, of his own direct knowledge and without even an alleged, much less demonstrated, improper disclosure by Mr. Randall, everything there is to know about it germane to this case. Plaintiffs do not claim that Randall's so-called preparation of the agreement involved any actual confidential disclosures to him by Org. His mere transposition of Bregman's own draft of the contract (infra p. 43-47) into possibly better form was far short of an attorney's representation of a client, as contemplated by Canon 9 to disqualify him by appearance. And, as discussed above, such an imputation

would certainly not extend further to the Weil firm.

Neither do plaintiffs assert, nor in any manner evidence, that Randall in fact improperly disclosed any professionally obtained confidential and privileged matter adverse to them in this litigation to either Bregman or the Weil firm concerning the Greene option agreement; or that he ever possessed such information in the first place. Indeed, their own attorney's affidavit, identified his partner, Mr. Winkler, not Randall, as Org's attorney in that transaction (57a).

There simply is no comparison between the roles played by Delulio for Celanese in the Hull case and by Randall for Org in this one. "Appearance of impropriety" is not applicable even to him, for he was neither called upon by Org to act as its attorney regarding any transaction involved in this case nor has he undertaken any of the responsibilities or the status or litigation counsel for Bregman in it. (Supra pp. 5-12.)

But even if it were otherwise, there would still be no basis for extending the appearance to the Weil firm, the mere "imputation-on-an-imputation" which every court faced with the proposal has rejected. (Supra pp. 16-22.)

Echoing the Hull court's caveat to district courts and the bar (supra, p. 23), although against a different factual background, the within court more recently emphasized:

> We caution, as the Connecticut Bar Association urges us to do, that Canon 9, though there are occasions when it should be applied, should not be used promiscuously as a

convenient tool for disqualifications when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules.

International Electronics (supra p. 14) Slip opinion at pp. 1157-8.

II

The nature and caliber of Randall's contacts with the Weil firm were too remote from participation in the within litigation to raise any question even under Canon 9, hence to permit disqualification of the Weil firm.

Cases cited in the preceding section demonstrate that disqualification of an unrelated lawyer is not tolerated even where the related attorney has, until himself disqualified, shared full and genuine litigative responsibility and participation with him in the later lawsuit. Supra pp. 16-26. A fortiori, here, since Randall has filled no such role in the within case.

Reference to the chronology set forth at pages 5-12 above, especially starting with October 24, 1973, will establish that it was not until January 8, 1974 that the likelihood of litigation between Bregman and Org entered the scene; and, then, only at the instance of Org itself. To the contrary, it had been Bregman's and the Weil firm's deliberate intent not to sue Org, but only Greene (as to whom, of course, neither the

Weil firm nor Randall has been in any relationship; certainly not one of attorney-client). The actuality of litigation between Bregman and Org did not materialize until January 24, 1974, when service of the latter's New York Supreme Court summons and complaint became effective. That was a week after Bregman's complaint against Greene had been filed in 74 Civ. 301 (CBM), now consolidated in the within action.

If litigation had remained confined to Bregman's suit against Greene, there surely could have been no pretension as to any appearance of impropriety, especially with respect to the Weil firm. Thus, it is to events following January 8, 1974 that one must look if he would find such an appearance. Clearly, Randall occupied no position and performed no function as legal counsel in this action from January 8, 1974 on (supra pp. 10-12) even had he done so before, - which he had not. To hold, as did the district court, that there had been in fact such a status as "... Randall's representation of defendant ..." (8a.) in this action is pivotal error that permeates its dependent decision.

Even before January 8 his activities had gone no further than to pass on to the Weil firm certain documents, with brief descriptions of them, and to discuss the nature and extent of Bregman's legal rights as they appeared from within the four corners of such papers (supra pp. 5-10), which the district court has characterized as seeming "clear on their face" (4a). All of these had been previously exposed to Bregman himself, who was not only a direct subject of them

but was also the president, chief operating officer and a director of NCK, and a director, shareholder and the senior vice president of Org. As such, Bregman was Randall's superior, and entitled to receive from him all corporate confidences and secrets appropriate to the performance by Bregman of the responsibilities and duties imposed upon him by such offices.

Further, of those documents only four relate to the within suit: Bregman's Standard Stockholders' Agreements of October 25, 1967 and February 6, 1968 (Px1 and 2), his employment contract of June 17, 1970 (Px3) and the Greene option contract of August 31, 1972 (Px9). (See Defendant's Memorandum in Support of the Motion for Summary Judgment, pp. 1-8 [123a-131a]; and Bisco affidavit: "The turning point of this case really depends upon an agreement dated June 17, 1970 ..." [56a] Bregman was surely privy to these instruments, and he and the Weil firm were entitled so to be, without any actual or apparent impropriety on anyone's part.

At one passage in Mr. Randall's deposition he used certain terms about which, because of their equivocalness, plaintiffs can be expected to make much ado. At pages 30, 33, and 34 he referred to the Weil firm as "co-counsel" (197a-200a) and at page 36 he said he had given "advice" either "to Mr. Weil or... to Mr. Bregman because I believe that on one or two occasions in question they were both in the same room." (202a.)

For one thing, "giving advice" by no means implies revealing or exploiting confidential information. To the

contrary, Mr. Randall's immediately preceding testimony explicitly and firmly revealed his keen awareness of the difference. On July 15, 1973, after Mr. Randall had left Org's employ, Bregman asked whether Mr. Randall could then act as his attorney.

> He [Bregman] said I have not raised this with you until now because I knew it would be improper to do so. However, now you are no longer an employee of NCK and therefore, you are a free man. I said yes, Walter, and I said there is no barrier to my representing you to the extent that it doesn't betray any professional confidences or whatever, and that was the sum and substance of our discussion at the time.
>
> DWR Dep. pp.32-33
>
> (199a-200a).

Further, even if Mr. Randall and the Weil firm were in actuality "co-counsel" in the within case itself, that would be insufficient in law, without proof of actual impropriety, to disqualify the latter (supra, pp. 15-26; especially American Can, supra, pp. 18-19). Obviously, "co-counsel" or associated counsel would exchange "advice" with each other regarding the case for which they had been retained; but that alone has never led to disqualification of the unrelated attorneys (see the authorities cited at the above referenced

pages of this brief).

In any event, Mr. Randall's subsequent, unimpeached, and unrefuted testimony leaves no doubt that he was never a true associate or co-counsel in the within litigation. His presence at meetings with the Weil firm, whatever advice he may have offered, were all in his role as Bregman's personal attorney or as witness by deposition herein at the instance of the plaintiffs themselves. (DWR Dep. pp. 209-217 [34a-42a].)

> I don't know what you are driving at but I don't intend to bill Mr. Bregman for any legal fees in connection with this litigation because I am not representing Mr. Bregman in this litigation.
>
> Q You said you were co-counsel.
>
> * * * *
>
> You said at page 30 "I might say co-counsel for Mr. Bregman which is the firm of Weil, Lee & Bergin" and then you were asked who was the other counsel and you answered "me". You were then asked when did you become counsel.
>
> "Answer: On or about July 15, '73."
>
> MR. WEIL: Obviously there was no such litigation in July of 1973.

A So, therefore, - then I will put it on the record just to make it clear - when I used the term co-counsel in the previous testimony it was intended to mean only the fact that I have in the past, since or subsequent to July 15, 1973, acted as counsel for Mr. Bregman on what you might call a personal basis in connection with certain matters and it was not intended to mean or imply that I am co-counsel with the firm of Weil, Lee & Bergin in the pending litigation in connection with which this testimony is given.

Q Yet you advised them often about the pending litigation, did you not?

A No.

* * * *

Q You had several visits to their office during the course of the litigation, did you not?

MR. WEIL: I object to the word "several." I think he said he had about three.

A And only in connection with my appearance here as a witness.

* * * *

A . . . I have reviewed my previous testimony at pages 33 and at pages 177 and 178. I would like to point out that the gist of my testimony at pages 177 and 178 is that over the period of time since approximately November 1, 1973 up to the present date there were really two different representative series of meetings that I had with Mr. Weil or at his firm. The first series of meetings I attended in my role as personal counsel for Mr. Bregman and that series of meetings which consisted of as I think I have testified three, perhaps four, meetings took place to the best of my recollection between November and the end of 1973.

MR. WEIL: Mr. Bisco, can the record reflect what is the fact? Give us some perspective that you instituted the litigation in January 1974.

MR. BISCO: Yes.

A To continue my answer, the other series of meetings that I have had with Mr. Weil or his associate, Mr. Hafner, in their offices has been in connection with my testimony as a witness in this proceeding and those meetings took place beginning the fall or late summer of this year, early fall.

* * * *

[T]he question of whether it would be desirable for me to represent Mr. Bregman in connection with any litigation between himself and NCK or Mr. Greene did come up and it was decided between myself and Mr. Bregman that it would not be desirable and inasmuch as Mr. Weil's firm had already been retained by Mr. Bregman to counsel him in connection with matters relating to the termination of his employment and given the fact that Mr. Weil and his firm have considerable expertise in litigation, it was decided that Mr. Weil's firm should represent Mr. Bregman in connection with any such litigation.

DWR Dep. pp. 210-215 (35a-40a).

III

Randall did not serve as counsel to Org in any matters substantially related to the issues in this case; and if he had, they would not have been of a nature confidential or secret as against Bregman.

The strategy of the plaintiffs before the district court, both to defeat Bregman's motion for summary judgment and to advance their own motion to disqualify Randall and the Weil firm, was to propose a number of supposed issues of fact requiring trial, and in the background of which Randall assertedly served as Org's lawyer. (See, for example, Bisco affidavit [55a-65a]). Apparently the district court was persuaded (4a).

The record, however, firmly documents an absence of issues of fact material and relevant to Bregman's rights under his "clear on their face" contracts, or to his alleged breach of fiduciary obligation, or to Randall's performance of services for Org of such a kind as to involve disclosure to him of information that was actually, or even properly, secret and confidential as against Bregman himself.

A. As to Bregman's fiduciary duty and Org's and Bregman's states of mind:

Org was not without its legal protectors: Randall, its house counsel, and Mr. Winkler (of the firm of Bisco, Winkler & Higgiston) who, according to his affidavit of March 20, 1975 in support of plaintiffs' motion for summary judgment, "prepared all the papers required for the [Greene] transaction, including ... the granting of options of 5,000 shares each to

the five top executives of NCK and Organization except Norman B. Norman, ..." (Randall [DWR] Dep., pp. 90, 91, [32a, 33a]; Px23A, 23B, 23C [51a, 52a, 53a]).

Additionally, and not least, Mr. Kaplan, who was intimately involved in the Greene transaction, for it was his stock that was being transferred, had been the president of NCK and, as such, had negotiated and signed the 1970 contract with Bregman.

Mr. Norman, himself, Org's president, chief executive officer, and board chairman, had a copy of it in his own desk at home. (Winkler affidavit of March 20, 1975, ¶7.)

If not a single one of these persons happened to remember the 1970 contract or did not consider it important to be taken into account; if the lawyers representing Org did not bestir themselves to check whatever pertinent contracts with the optionee executives resided in the corporate files, such indifference or neglect is chargeable to the corporation and not to be put on Bregman's doorstep.

Insofar as states of mind are concerned: 1) Bregman's own state of mind is not secret or confidential from himself; and Org could hardly be expected, in a moment of confidence and concealment, to have disclosed to Randall something along the lines of "We really do know about Bregman's 1970 contract but we're going to pretend we don't, so keep it quiet." One can hardly doubt that if Randall were professionally privy to information evidencing Org lacked knowledge, actual or constructive, of the 1970 contract when it negotiated the Greene options Org would have been happy indeed to waive the privilege and elicit

that proof of him.

Finally, and conclusively, whether Org can maintain a defense against Bregman based upon a "state of mind" allegedly at war with written contracts that "seem clear upon their face", or can rely upon an asserted institutional amnesia to disclaim corporate knowledge of those documents, when they were admittedly in the corporate records and were frequently referred to in entries in its corporate books (none of which books or records were confidential against Bregman, as senior vice president and stockholder and director of Org, and as president, chief operating officer and a director of NCK), are issues of law that do not impinge for their resolution upon any confidential disclosures that could have been made by Org to Randall.

B. As to Randall's "intimate involvement with the affairs of Org and NCK" (8a):

As pointed out in the preceding section, the only "affairs" of Org or NCK that relate to the within action are those dealing with the Standard Stockholders' Agreements, Bregman's 1970 employment contract, and the Greene option contract; and as to them there was nothing kept or to be kept confidential from Bregman, both because of the corporate offices and responsibilities he held, and his personal involvement in those transactions. In any event, being clear on their face, it is the documents themselves that count in this case, not any surrounding circumstances or silent states of mind.

Nevertheless, and beyond that, as will now be shown, the record is clear that Randall was not truly involved in those

transactions in a professional capacity.

1. Standard Stockholders' Agreement ("SSA") (17a-20a, Pxl, 2)

The form SSA executed by Bregman and other employees was in use before Randall was hired and was neither drafted nor prepared by him (DWR Dep. p. 233); he was not asked to render any legal advice to Org with regard to them (DWR Dep. pp. 233, 238, 239) and did not negotiate for, consult with or receive any confidential information regarding them from Org. (DWR Dep. pp. 234, 239).

> Q Mr. Randall, I refer you to the standard stockholders' agreement signed by Mr. Bregman and previously identified as Plaintiff's Exhibit I. Would you take a look at that and refresh your recollection as to it. Did you render any legal advice to NCK with regard to this document?
> A I think I have testified before to some extent on this point but again to sum it up. The document which is marked as Plaintiffs' Exhibit I is a copy of a four-page printed form which bears the title "Stockholders' Agreement." This

form of agreement was being used when I joined the company in 1967 as the basic agreement between the company and each individual who purchased the shares of the company. It is my understanding based on knowledge that I acquired while I was employed by NCK and was performing the functions of Secretary and/or house counsel that this form of agreement had been in effect and had been used for this purpose for at least several years prior to 1967 substantially in this exact form.

Q Did you draft it?

A Obviously I did not draft it because as I said it had been in effect in this form for a number of years.

Q Did you render any legal advice to NCK with regard to the transaction shown in that document? In other words, the transaction between NCK and Mr. Bregman.

A Let me see if I understand you. The document which has been marked Plaintiffs' Exhibit I is an agreement covering -- and I think there is adequate testimony in the record on this -- covering a purchase of shares of stock of what was then Norman, Craig & Kummel, Inc. by Mr. Bregman and I think I already testified that in view of the date of this document, which is October 25, 1967, I have no recollection of having been involved in the transaction at all.

Q So the answer to my question is?

A The answer to your question is no.

Q Did you negotiate in any way for NCK with Mr. Bregman with regard to this transaction?

A No.

Q Did you represent NCK in any manner with regard to this transaction as an attorney?

A No.

Q Do you know who did?

A I think we ought to make it clear that having reduced the terms and conditions of the holding of shares as between the company and individual shareholders to a printed form, it became essentially unnecessary for anyone to function in a role of attorney with

regard to each of these succeeding transactions.

DWR Dep. pp. 232-234.

Randall's testimony also clearly shows that prior to his employment employee share purchases had been handled by Roselou Flanagan, a non-lawyer employee of Org. (DWR Dep. pp. 16-17 and 71.)

With regard to the SSAs, then, Randall was not representing Org as a lawyer. Indeed, they presented no necessity for legal representation, having been reduced to a "fill-in-the-blanks", garden variety, printed form agreement. Randall did not occupy a dual position as to the SSAs.

2. Employment contract of June 17, 1970 (21a-24a, Px3)

Prior to his transfer to New York, while Bregman was in charge of NCK's European operations based in London, he negotiated with B. David Kaplan (a non-lawyer) the terms of his transfer and eventual assumption of the presidency of the New York company. The negotiations were memorialized in a letter (Dx9) written by Bregman (WWB Dep. p. 38) and sent to Kaplan (DWR Dep. pp. 240, 241 [46a]) which formed the basis for the formal employment contract (Px3).

> A ... The draft that I wrote was based in turn on a written memorandum or letter from Mr. Bregman to Mr. Kaplan in which Mr. Bregman set out the terms of the agreement that had been reached between him and Mr. Kaplan concerning his coming back to New York from his post in London and the

various details in connection with that transfer. On the basis of that document I prepared a draft and I think it is fair to say that the -- that Plaintiffs' Exhibit 3 is substantially in the form of my draft.

DWR Dep. p. 241 [46a].

* * * *

A ... [Plaintiffs' Exhibit 3] was prepared -- was written, typewritten, at the direction of Mr. Bregman and Mr. Kaplan, and when it was completed in this form, to the best of my recollection, the -- one or more copies were delivered to Mr. Kaplan who, again, as I recall undertook to have the document executed by himself and Mr. Bregman.

DWR Dep. p. 7 [29a].

* * * *

A It is my recollection that a signed copy of this document was returned to me in due course, whenever that was, and I placed that copy in the files which I maintained of similar agreements.

DWR Dep. pp. 8-9 [30a-31a].

Randall took no part in the negotiations leading up to that contract (DWR Dep. p. 241 [46a]) and received no confidential information regarding it which was unknown to Bregman. (Ibid.) The operative portions of both Px3 and Dx9, insofar as this action is concerned, are substantially identical:

Q Defendant's Exhibit 9C, the paragraph on that page, page 3 of that document, numbered 4A. Would you read that, please.
A I think we have to back up to the language that leads into paragraph 4A. The gist of which is that Mr. Bregman is saying that certain changes ought to be made and I will quote. "In the unlikely event that you wish to sever my relations with the company or remove me from the position of CEO. This should include A: Payment in full on all my shares owned at the time without regard to the three year vesting period described in the current stockholders' agreement."

Q Mr. Randall, what do you understand the initials CEO to mean?
A I think it is clear from the context of Mr. Bregman's letter that CEO means Chief Executive Officer.

Q What did you do or what was the outcome of that particular passage of Mr. Bregman's letter, Defendant's Exhibit 9C?
A Referring now to Plaintiffs' Exhibit 3, paragraph 8, the provision that has just been quoted from Mr. Bregman's letter, is reflected in Plaintiffs' Exhibit 3 in the following language: "If your employment is terminated by NCK, all shares of the

capital stock of NCK then owned by you will be repurchased in accordance with the second part of paragraph 3 (If the Stockholder (i) should at any time die:) of the Stockholders' Agreement dated October 25, 1967 between you and NCK, without regard to the length of time you have held such shares. Your Stockholders' Agreement is hereby amended accordingly."

Q Mr. Randall, I will refer you to page 4 of Mr. Bregman's letter of January 1, 1970 which has been identified as Defendant's Exhibit 9D and I would like you to read that subparagraph numbered 5B on that page for the record, please.

A Paragraph 5B reads as follows: "Under the current stockholders' agreement, I believe my pay back upon termination can be limited to $20,000 per year and 4% interest on the unpaid balances. Obviously this is unreasonable in today's money market. I suggest a program of payment in equal fifths (20% per year) with average yearly bank rate interest paid on the unpaid balances."

Q As to that specific passage of Mr. Bregman's letter, what did you do or how was that provided for in the June 1970 agreement?

A Referring to Plaintiffs' Exhibit 3, paragraph 9, the language that I have just read from Mr. Bregman's letter is incorporated in that document as follows: "If your employment with NCK is terminated for any reason, either by you or by NCK, payment for the shares of capital stock of NCK repurchased from you will be made in five equal annual installments. The first such installment will be paid at the closing and the remaining installments at yearly interest intervals thereafter, with interest from the closing date at a rate equal to the average prime rate charged during the period by the principal New York banker of NCK. Paragraph 5 of the Stockholders' Agreement dated October 25, 1967 between you and NCK is hereby amended accordingly."

DWR Dep. pp. 248-250 [47a-49a].

Randall modified the language in Dx9 to put it in more precise form at the express direction of Kaplan (DWR Dep. pp. 7 [29a], 246).

3. Greene agreement and option (Px9)

The Greene agreement was drafted by Mr. Winkler (DWR Dep. pp. 62, 138) whose firm was Org's lawyer with regard to it and the related and underlying transactions. (Bisco affidavit

¶¶4, 5 [48a]). It was Winkler who "worked out the details" of the Greene deal (Norman B. Norman [NBN] Dep. p. 19).

Randall was not acting as Org's attorney with regard to the option agreement; he merely suggested certain changes in his capacity as Org's financial officer (DWR Dep. pp. 4, 228, 229). [Mr. Norman relied rather heavily on Randall's financial expertise (NBN Dep. p. 16).] For example, Randall suggested that the effect of Org's current position on repurchases be expressed as a ratio of current assets to current liabilities, rather than in dollar terms and that the determination of the current ratio be accomplished through Org's regular internal audit procedures (Px29C, 29D).

His limited, and certainly non-lawyer, role is reflected in the language of Winkler's transmittal letter of August 25, 1974 (Px12) which asks no advice, refers to no consultation, and discusses no legal matters. Randall was merely sent the documents as a custodian after the deal had been made: "Here are copies ..." (Px12). In contrast, however, as can be seen in Winkler's September 8, 1972 transmittal letter to Beresford (Px10), Winkler clearly casts himself alone in the role of attorney: "I have prepared ... I have eliminated ... I have retained ..." and seeks the advice of only Beresford, a non-lawyer: "... please look this over and let me have your comments." (Emphasis added).

4. Other non-germane transactions

Apart from the foregoing three areas, plaintiffs proffered a number of other incidents in their effort to conjure up triable issues of fact with regard to which Randall would

allegedly play a dual role as between Org and Bregman in this case. They are not mentioned in the district court's opinion, and evidently had no part in its decision. There is no need, therefore, to give them detailed attention at this time, if ever.

Suffice it to note, that should Org and Greene attempt to resurrect them in their answering brief, the Court will find them discussed in Randall's affidavit of January 22, 1975, especially at paragraphs 10-11 (76a-79a), and in Defendant's Memorandum in Opposition to Motion to Disqualify, January 24, 1975, at section III. B. 2. (108a-112a.)

IV

The Weil firm's representation of Bregman cannot taint the case. Its disqualification would subject him to needless, substantial expense, with no benefit to the plaintiffs.

Despite the difference in alleged professional misconduct between W.T. Grant Company v. Haines et ano., Docket No. 75-7385, Slip Opinion 2529 (2d Cir., March 9, 1976) and the instant case, the underlying principles implicit in the following language of the within Court, at slip opinion pages 2540-41, seem quite pertinent.

> As Judge Clark suggested in Fisher [Fisher Studio, Inc. v. Loew's, Inc., 232 F.2d 199 (2d Cir.), Cert. denied 352 U.S. 836 (1956)]and as we have recently noted in

Lefrak [Lefrak v. Arabian American Oil Co., Docket No. 75-7234, Slip opinion 1037 (2d Cir. Dec. 12, 1975)] we cannot lightly separate Grant from the counsel of its choice. Counsel here has been engaged for well over a year in the investigation and preparation of this lawsuit. Disqualification of present counsel and the substitution of a new attorney unfamiliar with the facts and the law will inevitably result in further harmful delay and expense to Grant. The transcript of the Haines interview is a public record printed in the appendix of this appeal. While disqualification is clearly punitive insofar as Grant and its outside counsel are concerned, its benefit to Haines is indeed questionable. The business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it. Lefrak v. Arabian American Oil Co., supra, slip op. at 1047. Plaintiff has failed to establish that taint here in our judgment. Here, the Weil firm has not been shown, or even alleged, to have become privy to any information or disclosures

that are, in fact or properly, confidential to Org and involved in the case at bar. Its representation of Bregman, therefore, poses no threat to taint the case.

On the other hand, for Bregman to come up with new counsel after the Weil firm has been representing him from the outset, more than two years ago, through all the proceedings that have taken place (see docket sheets, Record Aa-Ea), would impose considerable expense, if not prejudice upon Bregman. Yet, it would yield the plaintiffs little, if any, benefit.

The case is one that, with all due respect for the district court's denial of summary judgment, we submit should be amenable to that disposition, turning, as it does, upon enforcement of contracts which, as the lower court did recognize, "seem clear upon their face". (Supra, p. 30.) There is nothing the plaintiffs stand to gain by having the Weil firm replaced in a case of such a nature.

Beyond that, as in W. T. Grant, everything pertinent to the case is on the public record already, through various depositions and/or affidavits of Randall, Bregman, Org's chairman (Mr. Norman), and its counsel (Messrs. Bisco and Winkler).

To "separate [Bregman] from the counsel of [his] choice" (DWR Dep. pp. 34-35; supra, p. 7) in such circumstances could only be "clearly punitive insofar as [he] and [his] outside counsel are concerned..."

V

Summary

1) There has been neither claim nor evidence of actual impropriety on the part of either Randall or the Weil firm.

2) Appearance of impropriety, alone, is not a permissible basis for disqualifying a lawyer unrelated at any time in the past to an adverse party; the Weil firm, therefore, cannot be disqualified.

3) Even a lawyer previously related to an adverse party, much less an unrelated attorney, is not to be disqualified upon merely the ground of appearance of impropriety unless the earlier attorney-client dealings included matters involved in or related to the pending lawsuit. Such a correlation has not been shown in this case even with regard to Randall; and lacking a basis for his disqualification there could be none for that of the Weil firm.

4) Even if Randall had acted as attorney for Org in matters significantly embraced by the within case (the contracts in issue), those activities and their surrounding events were neither secret from nor confidential against Bregman himself.

Conclusion

The order of the district court disqualifying the Weil firm from representing Bregman in the within action should be reversed and vacated, with costs and disbursements to the defendant-appellant.

Dated: New York, New York
April 14, 1976

Respectfully submitted,

WEIL, GUTTMAN & DAVIS
(formerly Weil, Lee & Bergin)

By _____
Gilbert H. Weil
Attorneys for Defendant-Appellant
Office and P. O. Address
60 East 42nd Street
New York, New York 10017
(212) 687-8573

Of Counsel
Gilbert H. Weil

With him on the brief
Bruce R. Hafner

Service of three (3) copies of the within
is admitted this 16th day of April 1976

Dissette Winkler & Huyghston
Attorney for Plaintiffs-Appellees, M.R.